

1 PAUL D. CLEMENT, ESQ. (DC Bar 433215)
pclement@bancroftpllc.com
2 H. CHRISTOPHER BARTOLOMUCCI, ESQ. (DC Bar 453423)
cbartolomucci@bancroftpllc.com
3 CONOR B. DUGAN, ESQ. (MI Bar P66901)
cdugan@bancroftpllc.com
4
5 BANCROFT PLLC
6 1919 M Street, NW, Suite 470
Washington, DC 20036
202-234-0090 (phone); 202-234-2806 (fax)

7 OF COUNSEL:
8 KERRY W. KIRCHER, GENERAL COUNSEL (DC Bar 386816)
Kerry.Kircher@mail.house.gov
9 JOHN D. FILAMOR, SR. ASS'T COUNSEL (DC Bar 476240)
John.Filamor@mail.house.gov
10 CHRISTINE DAVENPORT, SR. ASS'T COUNSEL (NJ Bar)
Christine.Davenport@mail.house.gov
11 KATHERINE E. MCCARRON, ASS'T COUNSEL (DC Bar 486335)
Katherine.McCarron@mail.house.gov
12 WILLIAM PITTARD, ASS'T COUNSEL (DC Bar 482949)
William.Pittard@mail.house.gov
13 KIRSTEN W. KONAR, ASS'T COUNSEL (DC Bar 979176)
Kirsten.Konar@mail.house.gov

14 OFFICE OF GENERAL COUNSEL
15 U.S. House of Representatives
219 Cannon House Office Building
16 Washington, DC 20515
202-225-9700 (phone); 202-226-1360 (fax)

17 Counsel for Proposed Intervenor The Bipartisan Legal
18 Advisory Group of the U.S. House of Representatives

19
20 **UNITED STATES DISTRICT COURT**
21 **NORTHERN DISTRICT OF CALIFORNIA**

22
23
20 KAREN GOLINSKI,) Case No. 3:10-cv-0257-JSW
21) Hearing: June 17, 2011, 9:00 am
Plaintiff,)
vs.) **REPLY OF THE BIPARTISAN
22) LEGAL ADVISORY GROUP OF
23) THE U.S. HOUSE OF**

1	UNITED STATES OFFICE OF PERSONNEL)	REPRESENTATIVES TO
2	MANAGEMENT, <i>et al.</i> ,)	PLAINTIFF'S STATEMENT OF
3)	NON-OPPOSITION TO MOTION
	Defendants.)	TO INTERVENE FOR A
)	LIMITED PURPOSE

4 Pursuant to this Court's Order Re Reply Brief on BLAG's Motion to Intervene (May 23,
 5 2011) (Doc. 110), the Bipartisan Legal Advisory Group of the U.S. House of Representatives
 6 ("House") respectfully replies to Plaintiff Karen Golinski's Statement of Non-Opposition to
 7 Motion of the Bipartisan Legal Advisory Group . . . to Intervene for a Limited Purpose (May 9,
 8 2011) ("Non-Opposition") (Doc. 108).¹

9 While plaintiff does not oppose the Bipartisan Legal Advisory Group's Motion to
 10 Intervene, she "requests that the Court's order reflect that it is BLAG . . . that is intervening."
 11 Non-Opposition at 1. The Bipartisan Legal Advisory Group is in fact the entity that seeks to
 12 intervene, as the Motion to Intervene makes clear. However, as we pointed out earlier, the
 13 Bipartisan Legal Advisory Group articulates the institutional position of the House in litigation
 14 matters, *see* Motion to Intervene at 1 n.1, including in this matter. Accordingly, all pleadings the
 15 Bipartisan Legal Advisory Group files in this matter including, but not limited to, the motion to
 16 dismiss we intend to file on or before June 3, 2011, in keeping with this Court's Order of May
 17 10, 2011, will reflect that institutional role.

18 With respect to plaintiff's asserted reservation of "the right to challenge the legality of
 19 BLAG's participation in this action at a later point," Non-Opposition at 1, plaintiff may raise

20 ¹ While the Department of Justice has said it also intends to file a response explaining its
 21 non-opposition—*see* Notice of Motion and Motion of the Bipartisan Legal Advisory Group of
 22 the U.S. House of Representatives to Intervene for a Limited Purpose at 2 (May 4, 2011)
 23 ("Motion to Intervene") (Doc. 103)—it has not yet done so. We will reply to the Department's
 response, if and when one is filed.

1 Article III standing issues at any point in the litigation. That said, we do not believe plaintiff can
 2 articulate a serious argument that the House—or the Bipartisan Legal Advisory Group speaking
 3 for the House—lacks standing here.

4 As an initial matter, so long as the Office of Personnel Management (“OPM”) and OPM
 5 Director John Berry remain parties to this action—and they will remain parties to this action,
 6 regardless of the role the Department chooses to play or not play in this litigation, until they are
 7 dismissed or the case concludes, neither of which has occurred—the House need not demonstrate
 8 any standing whatsoever. *See, e.g., U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir.
 9 1978) (“The question of standing in the federal courts is to be considered in the framework of
 10 Article III which restricts judicial power to cases and controversies. The existence of a case or
 11 controversy having been established as between the [existing parties], there was no need to
 12 impose the standing requirement upon the proposed intervenor [defendant].”) (quotation marks,
 13 citations, and brackets omitted); *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1172
 14 (10th Cir. 2007) (en banc) (Article III standing not required for defendant intervention where
 15 ongoing case or controversy); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998) (same);
 16 *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690-91 (6th Cir. 1994) (same).

17 While the Ninth Circuit “has not definitively ruled on the issue” of independent
 18 intervenor standing, *Prete v. Bradbury*, 438 F.3d 949, 956 n.8 (9th Cir. 2006), it has suggested
 19 that it “does not require independent Article III standing for intervenors.” *Id.* (citing *Yniguez v.*
 20 *Arizona*, 939 F.2d 727 (9th Cir. 1991), *vacated on other grounds sub nom. Arizonans for Official*
 21 *English v. Arizona*, 520 U.S. 43 (1997)).

22 In any event, it is clear from *INS v. Chadha*, 462 U.S. 919 (1983), that the House *does*
 23 have standing here. In *Chadha*, a private party challenged the constitutionality of a federal

1 statute that the Department declined to defend. After the Ninth Circuit ruled for the plaintiff, the
 2 House and Senate moved to intervene for the purpose of filing a petition for certiorari. *Id.* at 930
 3 n.5. The Ninth Circuit granted that motion, and the Supreme Court granted the subsequent
 4 House and Senate petitions for certiorari, holding—over the Department’s suggestion otherwise,
 5 *see* Mem. for the Fed. Resp’t, *U.S. House of Representatives v. INS*, Nos. 80-2170 & 80-2171,
 6 1981 U.S. S. Ct. Briefs LEXIS 1423, at *4 (Aug. 28, 1981)—that “Congress is both a proper
 7 party to defend the constitutionality of [the statute] *and a proper petitioner under [the statute*
 8 *governing petitions for writs of certiorari].*” *Chadha*, 462 U.S. at 939 (emphasis added). In so
 9 holding, the Supreme Court made crystal clear that the House and Senate had Article III
 10 standing: “[A]n appeal must present a justiciable case or controversy under Art. III. Such a
 11 controversy clearly exists . . . *because of the presence of the two Houses of Congress as adverse*
 12 *parties.*” *Id.* at 931 n.6 (emphasis added). Therefore, when the Department defaults on its
 13 constitutional responsibilities to defend the constitutionality of a statute, as it has here, the House
 14 may intervene and, when it does, it has Article III standing, including standing to appeal an
 15 adverse judgment.

16 In keeping with *Chadha*’s holding, congressional entities—including specifically the
 17 House through its Bipartisan Legal Advisory Group—repeatedly have intervened to defend the
 18 constitutionality of legislation the Department has refused to defend, including but not limited to:
 19 *In re Koerner*, 800 F.2d 1358, 1360 (5th Cir. 1986) (“In response [to the Department’s support
 20 for plaintiff’s constitutional challenge to the Bankruptcy and Federal Judgeship Act of 1984], the
 21 United States Senate and the House Bipartisan Leadership Group intervened to defend the
 22 constitutionality of the 1984 Act.”), and *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 787 F.2d
 23 875, 879, 880 (3d Cir. 1986) (President Reagan declared Competition in Contracting Act

1 [“CICA”] unconstitutional and “upon the advice of the Attorney General . . . ordered the
 2 executive department not to observe it;” the district court, “grant[ed] the motion of the Senate,
 3 the Speaker, and the Bipartisan Leadership Group of the House to intervene as plaintiffs to
 4 support the constitutionality of CICA”), *modified* 809 F.2d 979 (3d Cir. 1986); *see also Adolph*
 5 *Coors Co. v. Brady*, 944 F.2d 1543, 1545 (10th Cir. 1991); *Barnes v. Carmen*, 582 F. Supp. 163,
 6 164 (D.D.C. 1984), *rev’d sub nom. Barnes v. Kline*, 759 F.2d 21, 22 (D.C. Cir. 1984), *vacated on*
 7 *mootness grounds sub nom. Burke v. Barnes*, 479 U.S. 361, 362 (1987); *In re Moody*, 46 B.R.
 8 231, 233 (M.D.N.C. 1985); *In re Tom Carter Enters., Inc.*, 44 B.R. 605, 606 (C.D. Cal. 1984); *In*
 9 *re Benny*, 44 B.R. 581, 583 (N.D. Cal. 1984), *aff’d in part and dismissed in part*, 791 F.2d 712
 10 (9th Cir. 1986).

11 **CONCLUSION**

12 For the foregoing reasons, as well as the reasons we articulated earlier, the Court should
 13 grant the House’s Motion to Intervene.

14 Respectfully submitted,

15 /s/ Paul D. Clement
 16 Paul D. Clement, Esq.
 17 H. Christopher Bartolomucci, Esq.
 18 Conor B. Dugan, Esq.

19 BANCROFT PLLC²

20 May 24, 2011

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

52

53

54

55

56

57

58

59

60

61

62

63

64

65

66

67

68

69

70

71

72

73

74

75

76

77

78

79

80

81

82

83

84

85

86

87

88

89

90

91

92

93

94

95

96

97

98

99

100

101

102

103

104

105

106

107

108

109

110

111

112

113

114

115

116

117

118

119

120

121

122

123

124

125

126

127

128

129

130

131

132

133

134

135

136

137

138

139

140

141

142

143

144

145

146

147

148

149

150

151

152

153

154

155

156

157

158

159

160

161

162

163

164

165

166

167

168

169

170

171

172

173

174

175

176

177

178

179

180

181

182

183

184

185

186

187

188

189

190

191

192

193

194

195

196

197

198

199

200

201

202

203

204

205

206

207

208

209

210

211

212

213

214

215

216

217

218

219

220

221

222

223

224

225

226

227

228

229

230

231

232

233

234

235

236

237

238

239

240

241

242

243

244

245

246

247

248

249

250

251

252

253

254

255

256

257

258

259

260

261

262

263

264

265

266

267

268

269

270

271

272

273

274

275

276

277

278

279

280

281

282

283

284

285

286

287

288

289

290

291

292

293

294

295

296

297

298

299

300

301

302

303

304

305

306

307

308

309

310

311

312

313

314

315

316

317

318

319

320

321

322

323

324

325

326

327

328

329

330

331

332

333

334

335

336

337

338

339

340

341

342

343

344

345

346

347

348

349

350

351

352

353

354

355

356

357

358

359

360

361

362

363

364

365

366

367

368

369

370

371

372

373

374

375

376

377

378

379

380

381

382

383

384

385

386

387

388

389

390

391

392

393

394

395

396

397

398

399

400

401

402

403

404

405

406

407

408

409

410

411

412

413

414

415

416

417

418

419

420

421

422

423

424

425

426

427

428

429

430

431

432

433

434

435

436

437

438

439

440

441

442

443

444

445

446

447

448

449

450

451

452

453

454

455

456

457

458

459

460

461

462

463

464

465

466

467

468

469

470

471

472

473

474

475

476

477

478

479

480

481

482

483

484

485

486

487

488

489

490

491

492

493

494

495

496

497

498

499

500

501

502

503

504

505

506

507

508

509

510

511

512

513

514

515

516

517

518

519

520

521

522

523

524

525

526

527

528

529

530

531

532

533

534

535

536

537

538

539

540

541

542

543

544

545

546

547

548

549

550

551

552

553

554

555

556

557

558

559

560

561

562

563

564

565

566

567

568

569

570

571

572

573

574

575

576

577

578

579

580

581

582

583

584

585

586

587

588

589

590

591

592

593

594

595

596

597

598

599

600

601

602

603

604

605

606

607

608

609

610

611

612

613

614

615

616

617

618

619

620

621

622

623

624

625

626

627

628

629

630

631

632

633

634

635

636

637

638

639

640

641

642

643

644

645

646

647

648

649

650

651

652

653

654

655

656

657

658

659

660

661

662

663

664

665

666

667

668

669

670

671

672

673

674

675

676

677

678

679

680

681

682

683

684

685

686

687

688

689

690

691

692

693

694

695

696

697

698

699

700

701

702

703

704

705

706

707

708

709

710

711

712

713

714

715

716

717

718

719

720

721

722

723

724

725

726

727

728

729

730

731

732

733

734

735

736

737

738

739

740

741

742

743

744

745

746

747

748

749

750

751

752

753

754

755

756

757

758

759

760

761

762

763

764

765

766

767

768

769

770

771

772

773

774

775

776

777

778

779

780

781

782

783

784

785

786

787

788

789

790

791

792

793

794

795

796

797

798

799

800

801

802

803

804

805

806

807

808

809

810

811

812

813

814

815

816

817

818

819

820

821

822

823

824

825

826

827

828

829

830

831

832

833

834

835

836

837

838

839

840

841

842

843

844

845

846

847

848

849

850

851

852

853

854

855

856

857

858

859

860

861

862

863

864

865

866

867

868

869

870

871

872

873

874

875

876

877

878

879

880

881

882

883

884

885

886

887

888

889

890

891

892

893

894

895

896

897

898

899

900

901

902

903

904

905

906

907

908

909

910

911

912

913

914

915

916

917

918

919

920

921

922

923

924

925

926

927

928

929

930

931

932

933

934

935

936

937

938

939

940

941

942

943

944

945

946

947

948

949

950

951

952

953

954

955

956

957

958

959

960

961

962

963

964

965

966

967

968

969

970

971

972

973

974

975

976

977

978

979

980

981

982

983

984

985

986

987

988

989

990

991

992

993

994

995

996

997

998

999

1000

1001

1002

1003

1004

1005

1006

1007

1008

1009

1010

1011

1012

1013

1014

1015

1016

1017

1018

1019

1020

1021

1022

1023

1024

1025

1026

1027

1028

1029

1030

1031

1032

1033

1034

1035

1036

1037

1038

1039

1040

1041

1042

1043

1044

1045

1046

1047

1048

1049

1050

1051

1052

1053

1054

1055

1056

1057

1058

1059

1060

1061

1062

1063

1064

1065

1066

1067

1068

1069

1070

1071

1072

1073

1074

1075

1076

1077

1078

1079

1080

1081

1082

1083

1084

1085

1086

1087

1088

1089

1090

1091

1092

1093

1094

1095

1096

1097

1098

1099

1100

1101

1102

1103

1104

1105

1106

1107

1108

1109

1110

1111

1112

1113

1114

1115

1116

1117

1118

1119

1120

1121

1122

1123

1124

1125

1126

1127

1128

1129

1130

1131

1132

1133

1134

1135

1136

1137

1138

1139

1140

1141

1142

1143

1144

1145

1146

1147

1148

1149

1150

1151

1152

1153

1154

1155

1156

1157

1158

1159

1160

1161

1162

1163

1164

1165

1166

1167

1168

1169

1170

1171

1172

1173

1174

1175

1176

1177

1178

1179

1180

1181

1182

1183

1184

1185

1186

1187

1188

1189

1190

1191

1192

1193

1194

1195

1196

1197

1198

1199

1200

1201

1202

1203

1204

1205

1206

1207

1208

1209

1210

1211

1212

1213

1214

1215

1216

1217

1218

1219

1220

1221

1222

1223

1224

1225

1226

1227

1228

1229

1230

1231

1232

1233

1234

1235

1236

1237

1238

1239

1240

1241

1242

1243

1244

1245

1246

1247

1248

1249

1250

1251

1252

1253

1254

1255

1256

1257

1258

1259

1260

1261

1262

1263

1264

1265

1266

1267

1268

1269

1270

1271

1272

1273

1274

1275

1276

1277

1278

1279

1280

1281

1282

1283

1284

1285

1286

1287

1288

1289

1290

1291

1292

1293

1294

1295

1296

1297

1298

1299

1300

1301

1302</p

CERTIFICATE OF SERVICE

I certify that on May 24, 2011, I served one copy of the Reply of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to Plaintiff's Statement of Non-Opposition to Motion to Intervene for a Limited Purpose by CM/ECF, by electronic mail (.pdf format), and by first-class mail, postage prepaid, on the following:

James R. McGuire, Esq.
Gregory P. Dresser, Esq.
Rita F. Lin, Esq.
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482

Jon W. Davidson, Esq.
Tara L. Borelli, Esq.
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
3325 Wilshire Blvd.
Suite 1300
Los Angeles, CA 90010-1729

Christopher R. Hall, Trial Attorney
U.S. DEPARTMENT OF JUSTICE
Civil Division - Federal Programs Branch
Room 7128
20 Massachusetts Ave., N.W.
Washington, DC 20001

/s/ *Kerry W. Kircher*
Kerry W. Kircher